Brand X and Omissions From Gross Income

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The author argues that the IRS and Treasury were mistaken in concluding that the Supreme Court's 2005 *Brand X* decision provided authority for a regulation interpreting the 25 percent omission from gross income rule in the statute of limitations as being applicable to understatements of gross income resulting from basis overstatements. *Brand X* authorizes agencies to override court interpretations of statutory provisions only when the court interpretation represents a *Chevron* step two holding but not where the court interpretation is a *Chevron* step one holding. The Supreme Court decision in *Colony* is a step one holding and as such cannot be reversed by a regulation.

The IRS and Treasury recently issued temporary and proposed regulations relating to the special six-year statute of limitations provisions in sections 6501(e)(1)(A) and 6229(c)(2).[1] Under these statutory provisions, if a taxpayer or a partnership ''omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in [the taxpayer's or partnership's] return,'' the statute of limitations for assessing the tax is extended to six years from the normally applicable period of three years.

The temporary and proposed regs provide that ''an understated amount of gross income resulting from an overstatement of unrecovered cost or other basis constitutes an omission from gross income,'' for purposes of the six-year statute of limitations.[2] Under this interpretation, an omission from gross income would exist when a taxpayer includes gain on the sale of property but the amount of the gain is understated as a result of overstating the basis of the property.[3] This interpretation of ''omission from gross income'' in the temporary and proposed regulations differs from the interpretations adopted in recent decisions by the Ninth Circuit Court of Appeals[4] and the Federal Circuit Court of Appeals.[5]

Both the Ninth Circuit and the Federal Circuit concluded that they were required to interpret the concept of an omission from gross income in the six-year statute of limitations provisions as excluding an understatement of gross income resulting from an overstatement of basis. Under the interpretation adopted by both courts, an omission from gross income would exist when a taxpayer did not report on its tax return any gain on a sale of property that was in fact sold at a gain, but an omission would not exist when a taxpayer reported a gain on its tax return in an amount that was understated as a result of an overstatement of the basis of the property. Both courts concluded that the issue was controlled by the Supreme Court's decision in *The Colony, Inc. v. Commissioner*,[6] even though this decision dealt with the predecessor provision to section 6501(e)(1)(A) in the code of 1939 rather than with section 6501(e)(1)(A) under the 1954 code.

In reaching the conclusion that the issue was controlled by *Colony*, both the Ninth Circuit and the Federal Circuit relied on the fact that the statutory language stating the 25 percent omission test in section 6501(e)(1)(A) is identical to the statutory language that was at issue in *Colony*. Both circuits concluded that the addition of other language in section 6501(e)(1)(A) that was not present in the provision at issue in *Colony* did not affect the interpretation of the language that was at issue.

However, in a passage in its opinion that unquestionably prompted the IRS and Treasury to issue the recent temporary and proposed regulations, the Ninth Circuit suggested that the IRS and Treasury *might* have the authority to prescribe regulations adopting a different interpretation from that in *Colony*:

> However sensible the IRS's argument may be that a taxpayer can ''omit . . . an amount'' of gain by overstating its basis, this argument is foreclosed by *Colony*. The Court acknowledged that the statutory language was ambiguous, 357 U.S. at 33, but nonetheless rejected the same interpretation the IRS is proposing in this case. The IRS may have the authority to promulgate a reasonable reinterpretation of an ambiguous provision of the tax code,

[1]T.D. 9466 (Sept. 28, 2009), *Doc 2009-21297*, *2009 TNT 184-9*; REG-108045-08 (Sept. 28, 2009), *Doc 2009-21298*, *2009 TNT 184-11*.

[2]Temp. reg. section 301.6229(c)(2)-1T(a)(1)(iii); temp. reg. section 301.6501(e)-1T(a)(1)(iii).

[3]This issue does not arise in cases subject to the special rule in section 6501(e)(1)(A)(i), which provides that in the case of a trade or business, gross income is the total of the amounts received or accrued from the sale of goods or services without

(Footnote continued in next column.)

reduction for the cost of such sales or services, because in those cases basis does not affect the amount of gross income.

[4]*Bakersfield Energy Partners v. Commissioner*, 568 F.3d 767 (9th Cir. 2009).

[5]*Salman Ranch Ltd. v. United States*, 573 F.3d 1362 (Fed. Cir. 2009), *Doc 2009-17311*, *2009 TNT 145-13*.

[6]357 U.S. 28 (1958).

> even if its interpretation runs contrary to the Supreme Court's ''opinion as to the best reading'' of the provision. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83; *accord Swallows Holding, Ltd. v. Commissioner*, 515 F.3d 162, 170 (3d Cir. 2008). We do not.[7]

In the preamble to the temporary regulations, the IRS and Treasury noted that the position adopted in the temporary and proposed regulations was ''consistent with the Ninth Circuit's suggestion in *Bakersfield*,'' asserted that the statutory provisions were ''acknowledged by both the Ninth and Federal Circuits to be ambiguous,'' and contended that as a result, the position adopted in the temporary and proposed regulations ''is entitled to deference even if the agency's interpretation may run contrary to the opinions in *Bakersfield* and *Salman Ranch*.'' Treasury cited the same two cases by the Ninth Circuit in the passage quoted above, namely the Supreme Court's 2005 decision in *Brand X* and the Third Circuit's 2008 decision in *Swallows Holding*.[8]

Brand X held that under certain circumstances, an agency has the authority to adopt an interpretation of a statutory provision that differs from the interpretation of the same statutory provision that has been adopted by a court. The principal purpose of this article is to consider whether the interpretation of the current statutory 25 percent omission from gross income provisions to include an understatement of gross income resulting from an overstatement of basis falls within the sets of circumstances in which the principle established in the *Brand X* decision is applicable. The conclusion is that *Brand X* does not authorize the IRS and Treasury to adopt this interpretation, in light of the nature of the principle established in *Brand X* together with the nature of the Supreme Court's analysis in *Colony*.

Because the holding in *Brand X* concerning the relationship between judicial and agency interpretations of the same statutory provision applied and clarified principles that had been established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[9] some discussion of *Chevron* is necessary to establish the background for *Brand X*. Although the application of *Chevron* is pervasive in administrative law generally, the tax community has been somewhat slow to give *Chevron* its proper application.[10] *Swallows Holding*, the Third Circuit decision cited both in the passage from the Ninth Circuit *Bakersfield* case quoted above and in the preamble to the temporary regulations, held that the *Chevron* framework applies to income tax regulations issued under the authority of section 7805(a).

Chevron established a two-step analytical framework for determining whether agency interpretations of statutory provisions should be given deference by the courts. The first step is for the court to determine whether ''Congress had an intention on the precise question at issue.''[11] If so, ''that intention is the law and must be given effect.''[12]

If the court cannot determine that ''Congress had an intention on the precise question at issue,'' the question is whether the agency's interpretation is permissible or reasonable. A ''court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.''[13]

The *Chevron* decision left unresolved several issues regarding the application of this analytical framework.[14] One of the most important sets of open issues — whether the *Chevron* framework applied to *all* agency interpretations of statutory provisions, and, if not, which agency interpretations were covered and which were not — was addressed in *United States v. Mead Corp*.[15]

Mead held that not all agency interpretations of statutory provisions are entitled to be evaluated under *Chevron*. Under *Mead*, agency interpretations that result from notice-and-comment rulemaking ordinarily will trigger the *Chevron* framework.[16] *Mead* also made clear, however, that some agency interpretations that do not represent the result of notice-and-comment rulemaking may be eligible for the *Chevron* framework,[17] but *Mead* left considerable uncertainty about the determination of which agency interpretations would come within this category. Justice Antonin Scalia dissented in *Mead*, contending that any ''authoritative'' agency interpretation should trigger the *Chevron* framework.[18]

Other issues left open by *Chevron* were those addressed in *Brand X*, namely the interaction between a court's interpretation of a statutory provision and an agency's interpretation of the same provision in a case in which the court's interpretation occurred when the agency had not yet adopted an interpretation that would trigger the *Chevron* framework, but when the agency later adopts such an interpretation that differs from the court's earlier interpretation. As Justice Clarence Thomas's majority opinion in *Brand X* noted, ''There is genuine confusion in the lower courts over the interaction between the *Chevron* doctrine and *stare decisis* principles.''[19]

In *Brand X*, the Ninth Circuit rendered an opinion interpreting a statutory provision that had not yet been interpreted by the agency charged with administering the statute, the Federal Communications Commission. After this earlier Ninth Circuit decision, the FCC promulgated a regulation interpreting the statutory provision in a way that differed from the Ninth Circuit's interpretation. When the Ninth Circuit considered the effect of the FCC interpretation, it concluded that it was bound by its

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[7]568 F.3d at 778.
[8]74 *Fed. Reg.* at 49,322.
[9]467 U.S. 837 (1984).
[10]*See* Hickman, ''The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference,'' 90 *Minn. L. Rev.* 1537 (June 2006).
[11]467 U.S. at 843 n.9.
[12]*Id.*
[13]*Id.* at 844.
[14]*See* Merrill and Hickman, ''Chevron's Domain,'' 89 *Geo. L. J.* 833, 848-852 (Apr. 2001).
[15]533 U.S. 218 (2001).
[16]*Id.* at 229-230.
[17]*Id.* at 230-231.
[18]*Id.* at 239.
[19]545 U.S. at 985.

own prior interpretation of the statutory provision without regard to the fact that this interpretation was at variance with the interpretation in the FCC regulation.[20]

Justice Thomas's opinion for the majority concluded that the Ninth Circuit should have applied the *Chevron* framework to the agency interpretation rather than follow the prior Ninth Circuit opinion.[21] Justice Thomas's majority opinion held that the *Chevron* framework takes priority over *stare decisis*. Therefore, a prior judicial interpretation of a statutory provision takes priority over a subsequent contrary interpretation by the agency charged with interpreting the statute only if the prior judicial interpretation is based on a *Chevron* step one analysis that concludes that the provision has only one permissible interpretation:

> The better rule is to hold judicial interpretations contained in precedents to the same demanding step one standard that applies if the court is reviewing the agency's construction on a blank slate. . . .
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> The Court of Appeals erred in refusing to apply *Chevron* to the Commission's interpretation of the definition of ''telecommunications service.'' Its prior decision in *Portland* held only that the *best* reading of section 153(46) was that cable modem service was a ''telecommunications service,'' not that it was the *only permissible* reading of the statute.[22]

Justice Thomas's majority opinion noted that a ''contrary rule would produce anomalous results,'' because the question whether the agency's interpretation or the court's interpretation takes priority ''would turn on the order in which the interpretations issue'':

> If the court's construction came first, its construction would prevail, whereas if the agency's came first, the agency's construction would command *Chevron* deference. Yet whether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur. . . . Neither *Chevron* nor the doctrine of *stare decisis* requires these haphazard results.[23]

The reason there is some potential for confusion and misunderstanding regarding the application of the *Brand X* principle is that Justice Thomas's majority opinion repeatedly used the shorthand term ''unambiguous'' to characterize the outcome of a court's determination under step one of the *Chevron* framework that the statutory provision at issue has only one permissible interpretation:

> A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.[24]

Despite the references to statutory ambiguity in *Brand X* as the deciding factor in determining whether a prior judicial interpretation of a statutory provision can be overridden by a subsequent agency interpretation, it seems indisputable that the principle established by *Brand X* is that a *Chevron* step-two interpretation by a court can be overruled by a subsequent contrary agency interpretation but that a *Chevron* step one interpretation by a court cannot. *Brand X* held that the *Chevron* two-step framework was applicable to the issue of statutory interpretation presented in the case and that the Ninth Circuit should have applied that framework rather than follow its own prior interpretation of the statutory provision.[25]

Under *Chevron*'s two-step framework, a court's step one holding about the proper interpretation of a statutory provision necessarily precludes any other interpretation from being correct, but a court's step two holding regarding the ''best'' interpretation does not preclude an alternative interpretation by an agency in a form that triggers *Chevron*. The language in *Brand X* saying that only a prior judicial holding that the statutory provision at issue is ''unambiguous'' and is immune from being reversed by a subsequent agency interpretation should be viewed as shorthand for saying that only a step one holding is protected against agency reversal, consistent with similar shorthand used in *Chevron* itself.

Under the *Chevron* framework, a holding that a statutory provision is unambiguous means that the proper interpretation of the provision is decided under step one. The language that is most frequently quoted from the *Chevron* opinion as stating the step one test is as follows:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[26]

The statement of the *Chevron* step one test that was quoted earlier in this article appears in a footnote to the second sentence in the foregoing passage. It provided an important clarification to the statement of the test in the main text of the opinion:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. *If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect*.[27]

In light of the fact that the sentence in the *Chevron* main text to which this footnote is appended refers to ''the unambiguously expressed intent of Congress,'' the meaning of the footnote is that ''if a court, employing

[20] *Id.* at 979.
[21] *Id.* at 980.
[22] *Id.* at 982 and 984 (emphasis in original; citations omitted).
[23] *Id.* at 983.
[24] *Id.* at 982.
[25] *Id.* at 980.
[26] 467 U.S. at 842-843.
[27] *Id.* at 843 n.9 (emphasis added; citations omitted).

traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue,'' the statutory provision is considered unambiguous for purposes of the *Chevron* framework, and the meaning of the statutory provision is determined under step one of the *Chevron* framework. Thus, the term ''unambiguous'' as used in the *Chevron* opinion in the statement of the step one test necessarily must be understood as having the meaning provided by this footnote, and, as a consequence, the term ''unambiguous'' as used in Justice Thomas's majority opinion in *Brand X* must be understood in the same way — as a reference to step one of the *Chevron* framework, including application of ''traditional tools of statutory construction'' to determine whether ''Congress had an intention on the precise question at issue.''

Thus, the determinative issue in deciding how the *Brand X* principle applies to the temporary regs relating to the 25 percent omission from gross income test is whether the Supreme Court's 1958 decision in *Colony* should be considered a step one holding in terms of the *Chevron* framework (a holding that the interpretation adopted is ''the *only permissible* reading of the statute'') or whether it should be considered a step two holding (a holding that the interpretation adopted is ''only . . . the *best* reading'' of the statutory provision). As discussed below, the *Colony* decision was based both on the language of the statutory provision and on a consideration of legislative history. As part of the determination of whether the *Colony* decision should be viewed as a step one holding or as a step two holding, it is necessary to determine whether consideration of legislative history is one of the ''traditional tools of statutory construction'' that is considered part of the *Chevron* step one analysis.

The *Chevron* opinion does not explicitly state that a consideration of legislative history is one of the ''traditional tools of statutory construction'' that comes within the step one analysis in deciding whether ''Congress had an intention on the precise question at issue,'' but it *does* consider legislative history as part of the step one analysis:

> Based on the examination of the legislation *and its history* which follows, we agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble concept in these cases.[28]

Before turning to the step two analysis of whether the agency's interpretation was ''reasonable'' or ''permissible,'' the *Chevron* opinion considered the legislative history at length both in a separate section of the opinion, Section V,[29] and in a separate subsection headed ''Legislative History'' within Section VII of the opinion.[30] The Court concluded, ''We find that the legislative history as a whole is silent on the *precise question* before us,''[31] echoing the language (whether ''Congress had an intention on the *precise question* at issue'') used to describe the content of the step one inquiry.[32]

Supreme Court decisions applying the *Chevron* framework leave no doubt that consideration of legislative history is part of the *Chevron* step one analysis. For example, in *General Dynamics Land Systems, Inc. v. Cline*,[33] the Court engaged in an extended consideration of legislative history[34] as part of a discussion leading to a step one conclusion that there was no occasion to defer to the agency's interpretation:

> Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.[35]

That the *Colony* decision considered legislative history as part of its analysis does not mean that the decision's holding was a step two holding subject to being overruled by an agency regulation adopting a contrary interpretation.

There is some technical imprecision in phrasing the *Brand X* test as being whether the prior judicial interpretation represented a *Chevron* step one holding or a *Chevron* step two holding. The *Chevron* two-step framework does not apply unless there is an agency interpretation at issue that is of a type that, under *Mead*, would trigger the *Chevron* two-step framework, and the *Brand X* issue arises only in cases in which the initial judicial interpretation occurred in the absence of such an agency interpretation that would have been subject to the *Chevron* two-step framework. More substantively, this factor relates to one of the reasons why applying the *Brand X* principle is less than totally straightforward, as the temporary regulations discussed in this article illustrate.

Because the *Brand X* issue arises only in cases in which the *Chevron* two-step framework does not apply in the initial judicial interpretation of a statutory provision, that prior judicial interpretation would ordinarily not have been framed in terms of the *Chevron* two-step framework or in a way that would make it easy to determine whether the holding should be considered a *Chevron* step one or step two holding. This difficulty is exacerbated when the prior judicial interpretation predates not only *Brand X* but also *Chevron*.

The difficulties in applying the *Brand X* principle were forecast in Justice Scalia's dissent:

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[28]*Id.* at 845 (emphasis added).
[29]*Id.* at 851-853.
[30]*Id.* at 862-864.
[31]*Id.* at 862 (emphasis added).

[32]The fact that, under current Supreme Court practice, legislative history is not considered if the meaning of a statutory provision can be determined using tools of statutory construction that are based solely on the statutory text, including statutory context — *e.g.*, *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 567 (2005) — addresses a separate and distinct issue from the issue of whether legislative history is considered, *after* determining that the meaning cannot be determined from the statutory text alone, as part of the *Chevron* step one analysis.
[33]540 U.S. 581 (2004).
[34]*Id.* at 586-591.
[35]*Id.* at 600.

> Of course, like *Mead* itself, today's novelty in belated remediation of *Mead* creates many uncertainties to bedevil the lower courts. A court's interpretation is conclusive, the Court says, only if it holds that interpretation to be ''the *only permissible* reading of the statute,'' and not if it merely holds it to be ''the *best* reading.'' Does this mean that in future statutory-construction cases involving agency-administered statutes courts must specify (presumably in dictum) which of the two they are holding? *And what of the many cases decided in the past, before this dictum's requirement was established?*[36]

One of ''the many cases decided in the past, before this dictum's requirement was established,'' is *Colony*. *Colony* was decided in 1958, *Chevron* in 1984, and *Brand X* in 2005. *Colony* was decided not only 47 years before the *Brand X* principle was established, but also 26 years before the *Chevron* two-step framework was announced.

The Court's reasoning in *Colony* began with the statutory language:

> In determining the correct interpretation of section 275 (c) we start with the critical statutory language, ''omits from gross income an amount properly includible therein.'' The Commissioner states that the draftsman's use of the word ''amount'' (instead of, for example, ''item'') suggests a concentration on the quantitative aspect of the error — that is, whether or not gross income was understated by as much as 25%. This view is somewhat reinforced if, in reading the above-quoted phrase, one touches lightly on the word ''omits'' and bears down hard on the words ''gross income,'' for where a cost item is overstated, as in the case before us, gross income is affected to the same degree as when a gross-receipt item of the same amount is completely omitted from a tax return.
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> On the other hand, the taxpayer contends that the Commissioner's reading fails to take full account of the word ''omits,'' which Congress selected when it could have chosen another verb such as ''reduces'' or ''understates,'' either of which would have pointed significantly in the Commissioner's direction. The taxpayer also points out that normally ''statutory words are presumed to be used in their ordinary and usual sense, and with the meaning commonly attributable to them.'' ''Omit'' is defined in Webster's New International Dictionary (2d ed. 1939) as ''To leave out or unmentioned; not to insert, include, or name,'' and the Court of Appeals for the Sixth Circuit has elsewhere similarly defined the word. Relying on this definition, the taxpayer says that the statute is limited to situations in which specific receipts or accruals of income items are *left out* of the computation of gross income. For reasons stated below we agree with the taxpayer's position.[37]

Thus, in interpreting the statutory language ''omits from gross income an amount properly includible therein,'' the Court noted that the use of the term ''amount,'' rather than, for example, ''item,'' provided some support for the government's position, but that, in contrast, the use of the term ''omits,'' rather than, for example, ''understates,'' provided support for the taxpayer's position. The Court noted that based on the statutory language, the taxpayer's position was stronger, but not enough so for the inquiry to end with the statutory language:

> Although we are inclined to think that the statute on its face lends itself more plausibly to the taxpayer's interpretation, it cannot be said that the language is unambiguous. In these circumstances we turn to the legislative history of section 275 (c). We find in that history persuasive evidence that Congress was addressing itself to the specific situation where a taxpayer actually omitted some income receipt or accrual in his computation of gross income, and not more generally to errors in that computation arising from other causes. . . .
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> We have been unable to find any solid support for the Government's theory in the legislative history. Instead, as the excerpts set out above illustrate, this history shows to our satisfaction that the Congress intended an exception to the usual three-year statute of limitations only in the restricted type of situation already described.[38]

Despite the Court's statement that ''it cannot be said that the [statutory] language is unambiguous,'' it is impossible to read the foregoing passage from the Supreme Court's decision in *Colony* and not conclude that the Court believed that the interpretation it adopted was ''the *only permissible* reading'' and not ''only . . . the *best* reading.'' The Court began by stating that ''the statute on its face lends itself more plausibly to the taxpayer's interpretation.'' It added that it found in that legislative history ''persuasive evidence'' supporting the taxpayer's interpretation and that it has been unable to find ''any solid support for the Government's theory in the legislative history.'' ''Instead,'' said the Court, ''this history shows to our satisfaction that the Congress intended'' the interpretation advocated by the taxpayer. Thus, in the language used in *Chevron* to describe a step one holding, the Court in *Colony* determined that ''Congress had an intention on the precise question at issue.''

It is not reasonable to expect that the Supreme Court's 1958 decision in *Colony* would have been written in a way that would explicitly fit the decision into the two-step framework that was not established until the 1984 *Chevron* decision and that was not clarified on the relevant point concerning the relationship between an initial

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[36]545 U.S. at 1018 (emphasis in second sentence in original; emphasis in last sentence added; citations omitted).

[37]357 U.S. at 32-33 (emphasis in original; citations omitted).

[38]*Id.* at 33.

judicial interpretation and a subsequent agency interpretation until the 2005 *Brand X* decision. Thus, that the *Colony* opinion used language suggesting that the statutory provision was ambiguous should not be taken as meaning that the *Colony* holding was subject to being overruled by a contrary agency interpretation under *Brand X*, because it is unreasonable to expect that the *Colony* decision would give the terms ''ambiguous'' and ''unambiguous'' the special meaning assigned to them by the *Chevron* decision 26 years later.

As discussed above, that the *Colony* Court referred to legislative history in reaching its conclusion about the proper interpretation of the statutory language does not mean that this interpretation was not a step one holding for purposes of the *Chevron* framework, because consideration of legislative history is part of the *Chevron* step one inquiry if the court cannot reach a conclusion based exclusively on the statutory language and its statutory context. The *Colony* Court clearly believed that its interpretation was ''the *only permissible* reading of the statute'' and not ''only . . . the *best* reading.'' Thus, the holding in *Colony* is a *Chevron* step one holding and, as a consequence, is a holding that cannot, under *Brand X*, be overruled by a regulation.[39]

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[39]Both the Ninth Circuit in *Bakersfield* and the Federal Circuit in *Salman Ranch* concluded that the issue of the proper interpretation of the omission from gross income provision in section 6501 was controlled by *Colony*, despite that *Colony* was decided under the corresponding statute of limitations provision of the 1939 code. In reaching this conclusion, these courts rejected arguments by the government that the addition of the special rules in section 6501(e)(1)(A)(i) and (ii) in the 1954 code changed the 25 percent omission from gross income test in such a way as to make the *Colony* interpretation no longer applicable.

In the preamble to the temporary regulations, the IRS and Treasury state their disagreement with the conclusion by the Ninth Circuit and the Federal Circuit that the *Colony* holding is applicable to the current statute of limitations provisions. While I agree with the Ninth Circuit and the Federal Circuit that the addition of section 6501(e)(1)(A)(i) and (ii) do not prevent *Colony* from remaining applicable, the subject of this article is the issue of the applicability of *Brand X* to the temporary regulations, and the *Brand X* issue is presented here only if the Ninth Circuit and the Federal Circuit were correct in concluding that *Colony* remains applicable despite the addition of section 6501(e)(1)(A)(i) and (ii).

Colony is the prior judicial interpretation to be evaluated under *Brand X*. Both the Ninth Circuit and the Federal Circuit simply followed *Colony*. If the Ninth Circuit and the Federal Circuit were incorrect in concluding that the addition of section 6501(e)(1)(A)(i) and (ii) did not affect the continuing vitality of *Colony*, there is no *Brand X* issue because there is no prior judicial interpretation. Thus, the question whether the addition of section 6501(e)(1)(A)(i) and (ii) affected the applicability of *Colony* to the current statute of limitations provisions is beyond the scope of this article.

Also, this article does not address the important question whether the issuance of the temporary regulations violated the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. section 553. *See* Hickman, ''Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance With Administrative Procedure Act Rulemaking Requirements,'' 82 *Notre Dame L. Rev.* 1727 (June 2007).